

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4
5 ESTATE OF PATRICK HARMON)

6 SR., et al.,)

7 Plaintiffs,)

8 vs.)

Case No. 2:19-CV-553RJS

9 SALT LAKE CITY CORPORATION,)

10 et al.,)

11 Defendants.)

12 _____)

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15 BEFORE THE HONORABLE ROBERT J. SHELBY

16 -----

17 February 6, 2020

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19 Motion Hearing
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A P P E A R A N C E S

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February 6, 2020

1:30 p.m.

P R O C E E D I N G S

THE COURT: Good afternoon, everyone. Sorry to keep you for a minute. We have a jury out. We started a jury trial Monday morning. Our jury is deliberating and we have had several notes come in today and they may return a verdict and, of course, that is our priority, our jurors' time, so we may find ourselves recessing for a moment and resuming and we'll just ask you to be flexible with us if you would, please.

We'll call case number 2:19-CV-553. This is the Estate of Patrick Harmon versus Salt Lake City and Officer Fox.

Counsel, many of you are quite familiar to me, but please take a moment and make your appearances.

MR. LUTZ: Good afternoon, Your Honor. Nicholas Lutz appearing pro hac vice on behalf of the plaintiffs.

MR. MOHAMEDBHAI: Good afternoon, Your Honor. Qusair Mohamedbhai, also on behalf of the plaintiffs.

MR. RILEY: Corey Riley on behalf of the plaintiffs.

MR. DEISS: Andy Deiss on behalf of the plaintiffs.

THE COURT: Welcome to all of you.

1 MS. BRABSON: Your Honor, Catherine Brabson on
2 behalf of the defendants.

3 MR. MULL: David Mull on behalf of the defendants.

4 THE COURT: Welcome everyone.

5 This is the time set for hearing on the
6 defendants' qualified immunity motion and motion to dismiss.
7 It is a motion to dismiss I guess on those two alternative
8 bases. We have had the benefit of your briefing and I have
9 carefully reviewed the complaint and I have studied the
10 video of the incident from all three officer cams many
11 times. I have a number of questions for you, but I think I
12 generally understand the positions that you have all taken.
13 I think it is helpful to remind ourselves of the standard
14 through which we view the evidence and from where we take
15 the evidence on this motion at this stage of the
16 proceedings.

17 It is complicated I think by the presence of the
18 video. It seems to me that if this was a Rule 12 motion
19 based just on this complaint the motion would fail. We
20 would assume the truth of the well pled factual allegations
21 in the complaint and here they would be sufficient, assuming
22 the truth of those allegations, to survive the motion, I
23 think.

24 Of course we have in this case the video evidence
25 also, and I expect you'll both tell me what you think the

1 video shows or does not show, but I can see it myself and I
2 think the standard is this, that we look to see whether the
3 complaint has enough factual matter accepted as true to
4 state a plausible claim for relief, that familiar language
5 applying Rule 12(b).

6 In evaluating the allegations in the complaint, we
7 look within the four corners of the complaint, of course,
8 but we can also consider the attached exhibits and documents
9 incorporated into the complaint by reference or exhibits
10 that are indisputably authentic and central to the
11 plaintiffs' claim and referred to in the complaint. The
12 plaintiffs and the defendants both agree that that includes
13 the video evidence.

14 I don't know how persuaded I am about the
15 plaintiffs' objection that we shouldn't or can't consider
16 still photos from that video. There is no allegation that
17 they have been doctored or manipulated. To the extent that
18 they help the Court construe what is shown in the video, it
19 seems appropriate to me. Of course I note the plaintiffs
20 submitted still photos in the complaint so you must think
21 they have some evidentiary value. I just don't understand
22 that there is an evidentiary basis to accept the one and not
23 the other. I note that there wasn't a citation in your
24 opposition when you suggest that the Court shouldn't
25 consider the stills.

1 If the exhibit blatantly contradicts the
2 plaintiffs' version of events, then I am instructed to view
3 the facts in the light depicted by the exhibit. Of course
4 we are all familiar with the instruction from Iqbal and
5 Twombly, and it is relevant here, that the Court gives no
6 weight to legal conclusions or threadbare recitals of the
7 elements of claims. There are a number of allegations in
8 the complaint that are irrelevant I think for purposes of
9 Rule 12, because they are just entirely conclusory.

10 Whatever is left after all of that, these are the
11 well pleaded, non-conclusory, nonspeculative factual
12 allegations in the complaint. So long as they are not
13 obviously contradicted or blatantly contradicted by the
14 video, we'll assume those facts to be true and we will view
15 them in the light most favorable to the plaintiff. I think
16 that is the universe of facts that is before us today.

17 Then, of course, you're all familiar with the
18 Fourth Amendment analysis and the Fourteenth Amendment
19 analysis. We have the standards you have all briefed in
20 your papers about excessive force and the elements the Court
21 is required to consider under Graham, and then we have the
22 Estate of Larsen I think which informs some part of Graham,
23 and I will be interested to hear what you have to say today.

24 I don't know that it will be helpful for us to
25 spend much time focusing on the state claims initially. I'm

1 really interested in trying to make sure that I thoroughly
2 understand your arguments on the federal claims. If those
3 fail, I won't exercise supplemental jurisdiction at this
4 stage of the proceedings and we'll send the state claims
5 back to state court. I am not signaling one way or the
6 other. I just mean that that is what I will do consistent
7 with my past practice and the direction, at least the way I
8 construe the direction from the Tenth Circuit, about
9 allowing the state court to decide state issues of law.

10 It is the defendants' motion.

11 Ms. Brabson, maybe we begin with the defense then.
12 What would you like to tell us about the Fourth and
13 Fourteenth Amendment claims?

14 MS. BRABSON: Thank you, Your Honor.

15 First I think I would like to say that we concur
16 in your discussion of the standard here and certainly the
17 parts relating to how Iqbal ties in with video evidence. In
18 this case we have alleged that the video evidence blatantly
19 contradicts certain allegations in the complaint such that
20 the Court need not accept those allegations as true.

21 As an example I would like to spend just a few
22 moments talking about a case that I think really is an
23 excellent application of the standard as you have just
24 described it. That is the Estate of Ronquillo case versus
25 the City and County of Denver. Now, that case is also a

1 12(b)(6) case and so it is the same procedural posture as
2 this case. There essentially the police officers had an
3 arrest warrant for Mr. Ronquillo and they pursued him to the
4 point where his car was parked. At that point the officers
5 approached the vehicle and attempted to take him into
6 custody.

7 As they were attempting to do that, he did not
8 obey the commands to get out of his vehicle and the officers
9 attempted to physically by force remove him from the
10 vehicle. That was not successful. As this incident
11 progressed, the vehicle which he was driving collided and
12 moved forward with one of the law enforcement vehicles that
13 was parked in front of it.

14 At that point Mr. Ronquillo put the car in reverse
15 and backed up out of the parking lot and across the median.
16 There was a dash cam video that captured what I have just
17 described, but once the car backed up across the median, it
18 was no longer in the frame of the dash cam video. It was
19 during the time period that the car was outside of the frame
20 of the dash cam video that the officers fired their shots,
21 ultimately killing Mr. Ronquillo.

22 However, the car did reappear in the dash cam
23 video moving and accelerating rapidly forward across the
24 median back into the parking lot where it then crashed into
25 law enforcement vehicles.

1 The Court analyzed three statements in the
2 complaint, allegations in the complaint and considered
3 whether or not the video evidence blatantly contradicted
4 those allegations. The first allegation was that Mr.
5 Ronquillo did not know that he was being confronted by law
6 enforcement, that he was simply reacting in self-defense to
7 what would have been unknown assailants. By review of the
8 video, the court said I am not going to accept that
9 allegation as true because the officers in the video are
10 clearly wearing uniforms, there are marked police vests, and
11 certainly from the perspective of the officers, they would
12 have reasonably been able to conclude that Mr. Ronquillo
13 would have known he was being confronted by law enforcement
14 officers. So that allegation was not accepted as true.

15 The second allegation was that as Mr. Ronquillo
16 was fending off the officers' attempt to extricate him from
17 his car by force, it was that situation, the force of the
18 officers wrestling with Mr. Ronquillo, that jostled the car
19 forward into the law enforcement officer's vehicle and
20 caused the crash. It was not the intention of Mr. Ronquillo
21 to move the car forward as essentially the potential
22 dangerous weapon. The Court, in observing the video,
23 disagreed and said there was no other conclusion that the
24 Court could draw. His observation -- the Judge's
25 observation of the video was such that the car could not

1 have simply been jostled when it collided with the law
2 enforcement officer's vehicle and, thus, the suggestion that
3 that was an accident rather than an intentional collision
4 with the law enforcement officer's vehicle was rejected and
5 that allegation was not accepted as true and was blatantly
6 contradicted by the video.

7 The last allegation, and I think it is probably
8 the closest by analogy to the case here, was that at the
9 moment that the officer shot Mr. Ronquillo that, indeed, his
10 car was not moving and he did not have his foot on the
11 accelerator. Of course, that point in the video was not
12 captured because it was outside of the frame of the dash cam
13 video at that point in the interaction. And so the court
14 looked at the part of the video where the movement of the
15 car was apparent and was able to conclude, based on the
16 speed of the vehicle and how it moved across the median and
17 across the parking lot and crashed into the law enforcement
18 vehicles, that that movement of the car was entirely
19 inconsistent with the allegation that Mr. Ronquillo did not
20 have his foot on the gas before he was shot. So, again, the
21 court rejected that allegation.

22 I think this case is very instructive for us here,
23 because what we have and the key part of the video, and
24 there are other parts that are certainly relevant, but the
25 key part of the video for this analysis is about a

1 six-second portion. That interval starts from the time that
2 Mr. Harmon breaks away from the officers and begins to flee
3 and runs north and changes direction and begins to run south
4 and that six seconds end with the moment that Officer Fox
5 fires his weapon.

6 Now, the allegations that we have here are that
7 during that six-second interval that Mr. Harmon was fleeing
8 away from the officers and never turned and faced the
9 officers. I believe that a review of the video shows in a
10 frame-by-frame mode, and I think it is certainly no
11 different to watch a video in frame-by-frame mode with a
12 software program with pause and hitting start and stop and
13 so forth than it would be to watch the video, and just like
14 the Court mentioned, I don't believe there is an evidentiary
15 basis to object to watching a video in a frame-by-frame
16 mode. Other courts have also viewed videos in
17 frame-by-frame mode and I provided some citations to that
18 effect.

19 But if you look at the video in a frame-by-frame
20 mode in the instance just before the shots are fired, and if
21 you look at Mr. Harmon's feet, for example, they are pointed
22 back in the direction of the officers. His head is turned
23 so he is facing the officers. His upper body and shoulders
24 are turned so that he is facing the officers.

25 Previous to that he is making large leaps and

1 bounds away from the officers, but at that point he is
2 turned and is facing the officers and you can tell that by
3 an examination of his body and also his body language. His
4 arms, both of them, are raised and they are not down at his
5 side. Again, he is looking almost directly on at Officer
6 Fox in the video and not over at Officer Smith, who was to
7 his right, or over to Officer Robinson, who at that point
8 has actually fallen down in the grass and is to the left of
9 Officer Fox. So based on that six seconds of the video, I
10 think it is very easy for the Court to conclude that the
11 allegation that Mr. Harmon was fleeing is blatantly
12 contradicted by the video.

13 The six seconds of the video are not perfect. It
14 is not without some distortion. It is not without some
15 blurriness, but that is not the standard. There were pieces
16 of the video in the Ronquillo case that didn't show what
17 happened at all and yet the Court was still able to make
18 that conclusion.

19 So based on the location of Mr. Harmon's body
20 position, I don't think that that allegation should be
21 treated as true, that he was fleeing.

22 The second allegation --

23 Do you have a question, Your Honor?

24 THE COURT: It has to be blatantly contradicted
25 for me to reject it, right?

1 MS. BRABSON: Right.

2 THE COURT: What does it mean that I have to watch
3 all three videos over and over and over again and freeze it
4 and move it and freeze it and go back and look, and I am
5 left with a pretty firm conviction that if I were just a
6 juror, I would have an opinion about what the video shows,
7 but that there is room for disagreement about it. Whether
8 even Mr. Harmon, after he is -- I get the directions mixed
9 up.

10 Initially he goes in the one direction and comes
11 back the other direction and past the officers, and it
12 appears to me that he is at one point sideways and what
13 seems most likely maybe is that he is shuffling his feet. I
14 can see even in one frame where it looks like his toes might
15 even be pointed more in the direction towards the officer,
16 but it is unclear in which direction his body is moving at
17 that time. For sure there is a portion of the video where
18 we can see his torso sort of more open than closed from the
19 angle of one of the officers and his arms are in front of
20 him in the manner that we'll talk about today I'm sure.

21 Does blatantly contradict mean no juror looking at
22 that video could conclude that it shows anything other than
23 what you say?

24 MS. BRABSON: I do think that that has to be in --
25 certainly there is only one conclusion that a juror can find

1 and I agree that that is the standard and I agree that it is
2 a high standard but I think it is met here. It is met for a
3 couple of reasons. The reason you have to watch all of the
4 videos is because they are showing you what is going on from
5 a different perspective from each of the officers, and it is
6 the complete picture in this case that is essentially
7 allowing you to find the blatant contradiction. It is not
8 any one particular moment. It is not one officer's body cam
9 video. It is a little different than Ronquillo in that
10 situation.

11 I don't disagree that because this happened in
12 such an instant, it is six seconds and, in fact, from the
13 moment he turns to the moment Officer Fox fires, it is
14 probably, you know, a split second. That is why this
15 dovetails with the standard. You cannot judge what the
16 officer is doing from 20/20 hindsight. You have to evaluate
17 the situation in the circumstances that he is facing, which
18 in this case are tense and rapidly evolving and uncertain.
19 The officer is faced with that split-second decision.

20 THE COURT: Haven't you just blurred two things --

21 MS. BRABSON: I did. You're right.

22 THE COURT: I'm still trying to figure out what
23 fact I'm required to accept as true.

24 MS. BRABSON: I understand that.

25 The other fact that you have is Officer Fox's

1 statements and those are actually alleged in the complaint
2 and it is about two pages.

3 THE COURT: Would you slow down just a little bit?

4 MS. BRABSON: Sorry.

5 THE COURT: That is okay. Mr. Young had a very
6 long day recently and so he could use some help.

7 MS. BRABSON: There are facts in the complaint
8 that contain Officer Fox's statements to investigators. It
9 is actually not the complete statement, but there are many
10 of Officer Fox's statements to investigators. I don't think
11 you can discount those here. I think that what Officer Fox
12 said is confirmed by what you see in the body cam video.

13 THE COURT: Officer Fox -- I actually got confused
14 about this initially in your papers. I think I was not
15 giving you a charitable enough reading of something that you
16 said. I think what you are urging me to do is to assume the
17 truth of anything that Officer Fox said that is incorporated
18 in the complaint because the plaintiffs put it in there.

19 Is that what you're saying?

20 MS. BRABSON: Well, that is one aspect of it. The
21 other aspect of it is that there is not anything in the
22 complaint -- there is no other witness, for example, that
23 makes a contrary statement. What the plaintiffs are
24 suggesting and what they have offered in the complaint
25 essentially is that the video contradicts Officer Fox's

1 statements. That is the argument that they are making and
2 that because of that, you have to presume any allegations
3 that are made as true.

4 I think the exact opposite is the case. I think
5 you can consider Officer Fox's statements. Normally if we
6 were here on summary judgment, for example, we might have a
7 deposition or sworn testimony from Officer Fox, but what we
8 have here and what is included in the complaint is exactly
9 what he said and what he would say at least to some degree.
10 And I think if you look at some of the other cases I have
11 cited, and I think Johnson is the most prominent one that
12 comes to mind, and the court there -- that was a summary
13 judgment case, but the court --

14 THE COURT: So was Thomas.

15 MS. BRABSON: Yes. But in that case the court
16 looked to see if the video confirmed what the officer was
17 saying.

18 THE COURT: Do you mean that I should now construe
19 the facts in the complaint in the light most favorable to
20 you and I should review part of the video and if it is
21 consistent with your officer's testimony, I should flip the
22 Rule 12 standard?

23 MS. BRABSON: That is not what I'm saying.
24 Certainly not. What is missing from the complaint is any
25 other suggestion other than the video that Mr. Harmon was

1 not turned and facing the officer. I would also say that if
2 you watch the video carefully, Mr. Harmon actually gets
3 closer in those last few frames. It does require a careful
4 observation, but it is an addition to the body movement. He
5 is moving closer and he is moving towards Officer Fox so
6 there is that aspect.

7 THE COURT: There is a moment in the video where I
8 think that is true.

9 MS. BRABSON: Yes.

10 THE COURT: That seems to be the case at one
11 moment in a fluid situation.

12 MS. BRABSON: Correct.

13 THE COURT: It is not clear to me that that was
14 his last direction before the shots but who can tell?

15 MS. BRABSON: Well, again, we may have a
16 disagreement about who can tell, but I don't think that a
17 reasonable jury could conclude otherwise.

18 If it is all right with you, I will move on to the
19 next element, unless you have other questions.

20 THE COURT: I focus like a laser on standards
21 because I am a pedestrian court. I am just trying to
22 identify the standard that applies and apply it. So when
23 you say in your papers that I should consider the statements
24 and testimony of the officers' recounting of the incident,
25 through what lens legally at Rule 12? I should assume those

1 statements as true? I should not? I should just be aware
2 of them? What use am I required to make of them?

3 MS. BRABSON: Well, I think just as in the
4 Ronquillo case, the court looked at the video and the
5 officers had given their view that they shot when the car
6 was moving and the court said that the video confirms that.

7 THE COURT: To aid in my review of what the video
8 shows me, is that what you're saying, to add context?

9 MS. BRABSON: Correct.

10 THE COURT: Okay. Thank you.

11 You were going to move on to another point. Was
12 it the knife?

13 MS. BRABSON: The next point I think is the
14 allegation that Mr. Harmon was unarmed. At the point in
15 time that Officer Fox fired his weapon -- sorry. I have a
16 tendency to speak too fast.

17 THE COURT: We hadn't noticed.

18 MS. BRABSON: At the point in time that Officer
19 Fox fired his weapon, the video does not show whether or not
20 Mr. Harmon was armed.

21 THE COURT: I agree with that.

22 MS. BRABSON: So what do we know? What we do know
23 is that Mr. Harmon, after the shots were fired we can
24 observe his body and how it moved. He spun around to the
25 right. He fell to the ground. His right arm and hand

1 landed in the grass at about a 45-degree angle from his
2 body. In the ensuing five or six seconds Officer Robinson
3 walked toward Mr. Harmon. He picked up his right hand and
4 moved his arm in line with his body in order to restrain him
5 in handcuffs, which is our standard procedure in a deadly
6 force situation. At that point the knife is clearly visible
7 in the video. I believe plaintiffs have conceded that a
8 knife was found next to Mr. Harmon's body at the end of the
9 video.

10 THE COURT: I see it there. There is a knife.

11 MS. BRABSON: Right.

12 Then how do you get the knife from that point back
13 into his hand at the moment that Officer Fox fired? Again,
14 I'm going to use the analogy --

15 THE COURT: Let me propose how we might do that.
16 We might draw an inference in your favor.

17 MS. BRABSON: I'm sorry?

18 THE COURT: Is there a different way? Let's cut
19 to the chase. Am I not required to draw an inference in
20 your favor in order to determine that Mr. Harmon was armed
21 or the officers reasonably -- I don't know which. I think
22 we are dealing still with the facts in the complaint --

23 MS. BRABSON: I agree.

24 THE COURT: -- so to contradict the facts in the
25 complaint, am I not required to draw an inference in your

1 favor that the knife on the ground was in fact held by Mr.
2 Harmon and dropped when he was shot and collapsed?

3 MS. BRABSON: I don't believe it requires an
4 inference, but I do think that the Court is permitted to
5 find that no reasonable jury could conclude otherwise and I
6 think the conclusion is inescapable here. Again, I am going
7 to circle back to the Ronquillo case and --

8 THE COURT: Is it possible that one of the
9 officers on the scene became immediately concerned about
10 what happened and threw the knife forward to where Mr.
11 Harmon was on the ground or that there was a knife, as
12 improbable as it may seem, there was a knife already there
13 from earlier in the evening? Are any number of explanations
14 possible and what does that mean?

15 MS. BRABSON: I don't think any of those are
16 rational explanations. Number one, the knife was inches
17 from his hand. It was not out in the grass. It wasn't
18 several feet away. I don't think that that is a rational
19 inference a jury could draw.

20 With respect to whether an officer planted it,
21 there are three body cam videos watching Officer Robinson.
22 Officer Robinson was actually on the ground and didn't see
23 what happened before. Officer Fox, as you can see from the
24 video, is still standing there covering Officer Robinson.
25 There is absolutely no evidence of how a knife would have

1 been planted with three body cam videos on the scene.

2 You can also see clearly that it is Officer
3 Robinson's left hand that grabs Mr. Harmon's hand and his
4 right hand is holding handcuffs. So I don't see any
5 rational inference or conclusion that can be drawn by a jury
6 in that case. I'm sure the plaintiffs will disagree with
7 me, but that is our view.

8 THE COURT: I think you skipped the first part
9 though. I mean, we don't clearly see the knife in Mr.
10 Harmon's possession prior to the shots being fired.

11 MS. BRABSON: Correct.

12 THE COURT: Aren't you asking me in the first
13 instance to draw an inference that the knife that is seen in
14 Officer Robinson's video was in fact held by Mr. Harmon
15 prior to being shot? He exhibited the knife prior to being
16 shot. That is an inference I have to draw because I can't
17 see it on the video clearly.

18 MS. BRABSON: Okay.

19 THE COURT: Am I permitted to draw that inference?

20 MS. BRABSON: I would not describe it as an
21 inference so much, because I think that does sound incorrect
22 in view of the --

23 THE COURT: What would you call it?

24 MS. BRABSON: The Court can draw no other
25 conclusion. No rational jury could reach that conclusion.

1 There is no other inference that can be drawn. It is not
2 reasonable to say it was planted. It is not reasonable to
3 say it was there by chance. So that leaves one conclusion
4 that can be drawn by the Court and that is that it was in
5 Mr. Harmon's hand. That is not unlike the Ronquillo case.

6 THE COURT: Stop. You're going really fast.

7 MS. BRABSON: Sorry.

8 THE COURT: That is all right.

9 Did you just hear what you said? It is reasonable
10 for me to conclude. It is reasonable for me to think. Is
11 that not the work of a jury? Are you not inviting me to do
12 the thing I'm not permitted to do?

13 MS. BRABSON: Maybe I misspoke. What I meant to
14 say and what I should be saying is that there is no other
15 conclusion that the Court can draw because no reasonable
16 jury could find any other possibility than that this knife
17 was Mr. Harmon's and it was in his hand.

18 THE COURT: Are you sure that you're not saying to
19 me that it is so much more likely that that knife landed
20 right there because of the events that we see unfold,
21 including the raised arm so it looks like maybe he is
22 opening a knife, and then the way he falls to the ground
23 after he is shot, and the proximity of his arm to the knife
24 and the timing, and it would just be so fortuitous if the
25 knife was there for any other reason that it is just

1 unlikely that that is the case, and I should weigh the
2 probabilities and determine that there is no possibility?
3 You don't actually mean no possibility, you just mean that
4 it is so remote, the possibility that there was a knife
5 there or that it got thrown there or planted, that I should
6 discount it entirely. No?

7 MS. BRABSON: I wouldn't say so much discounted,
8 but that there is no other conclusion that the Court can
9 draw.

10 THE COURT: Okay.

11 MS. BRABSON: If that makes sense.

12 Again, it is like Ronquillo, because arguably in
13 the Ronquillo case maybe Mr. Ronquillo already had his foot
14 on the gas or he put his foot on the gas after he was shot
15 by some kind of reflex. There are certainly speculative
16 arguments that can be made, but I don't think speculation is
17 enough.

18 THE COURT: Do you mean to say, and what you have
19 just said at the end, and plaintiffs' counsel and I will
20 talk about this, but do you mean that the allegation in the
21 complaint is speculative?

22 MS. BRABSON: What is interesting to me is that
23 they don't make any suggestion about how that knife got
24 there.

25 THE COURT: Well, let's see.

1 MS. BRABSON: They don't argue that it was
2 planted. They don't allege that it was planted by one of
3 our officers and that is not even an allegation in the
4 complaint.

5 THE COURT: They say he is unarmed is what I mean.
6 Is that a speculative allegation?

7 MS. BRABSON: I think it is blatantly contradicted
8 by the video, yes, and speculative.

9 THE COURT: If it is speculative, what do I do
10 with it?

11 MS. BRABSON: I don't think you can consider it.
12 I don't think it is supported by facts. That is Iqbal and
13 Twombly and the plausibility standard. It is not plausible.

14 THE COURT: That is not what I think plausibility
15 means. This is a fine point maybe, but I think it is an
16 important one. I think plausibility is used in the context
17 of the plausibility of a claim, not the plausibility of a
18 fact. The Court is not supposed to be in the position of
19 independently evaluating whether a fact might be true or not
20 true or how likely it is. I mean, there may be some absurd
21 facts and you may say President Lincoln was not in fact
22 assassinated and lives among us today. I don't know what
23 standard the Court would apply to say, well, I am not going
24 to consider that, but short of that I am not in the business
25 of deciding whether I think the fact is true or not, right,

1 or plausible?

2 MS. BRABSON: Well, that is not entirely true
3 because you have folks that allege a conclusion that is a
4 combination of a mix of law and fact, for example. This
5 case is one of them. In the equal protection context, the
6 plaintiffs have alleged that Officer Fox had some racial
7 animus when he employed deadly force in this case. There
8 are no underlying facts for that. That is complete
9 speculation and I don't think the Court can accept that as
10 true. It is conclusory and speculation, but it is a little
11 of both, if that is an example I may offer.

12 THE COURT: Okay.

13 MS. BRABSON: Okay. Any other questions?
14 Do you want me to address equal protection?

15 THE COURT: Why don't we do this one claim at a
16 time.

17 MS. BRABSON: Okay.

18 THE COURT: Thank you. I think that is probably
19 helpful, so I can keep it all in my little brain.

20 MS. BRABSON: Thank you.

21 THE COURT: Thank you.

22 Mr. Lutz. Did I say that right?

23 MR. LUTZ: You did. Thank you, Your Honor.

24 Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MR. LUTZ: Before I begin, I just wanted to note
2 that the plaintiffs are not in the courtroom today, though
3 they desired to be here very much, but circumstances just
4 didn't allow them to travel out of state to be here today.
5 Obviously they take this matter very seriously and would
6 have liked to have been here to hear the Court's
7 consideration.

8 THE COURT: Thank you.

9 The guardrail, such as it is, I think for our Rule
10 12 standard that we apply to complaints is Rule 11. I don't
11 raise Rule 11 like a threat or even an implied threat. I
12 just mean that the reason that we can take comfort, assuming
13 the truth of factual allegations in a complaint, is that we
14 know as officers of the court we have some independent duty
15 to investigate the facts and believe that there is a good
16 faith basis for them before you assert them.

17 On what basis could anybody who was not at the
18 scene make an allegation in a complaint that Mr. Harmon is
19 unarmed?

20 MR. LUTZ: That is a fair question, Your Honor.
21 I, like you, have watched these videos a myriad of times,
22 hundreds of times. Everyone on my team has done the same.
23 We spent weeks and months investigating this case and trying
24 to determine what allegations would go into that complaint.
25 The fact remains that none of us were able to come to the

1 conclusion that there was any evidence from the video that
2 Mr. Harmon was armed. And we went about trying to find
3 anything that would disprove that notion in our own minds
4 before we brought this before the Court. What we discovered
5 were simply more questions about the alleged knife.

6 Now, as the Court and my colleagues have noted, we
7 acknowledge and affirmatively pled that a knife was found at
8 the scene. However, it is not seen on the video and it is
9 not clear that any of the officers even perceived a knife.
10 So even if Mr. Harmon had it, which I don't think that we
11 see at all, that is not clear.

12 Moreover, the knife itself raises some incredible
13 questions. For one it is an EMT style rescue knife, right,
14 which features a seat belt cutter and a window breaker,
15 because this is the type of tool used by our law enforcement
16 and our emergency medical personnel. Mr. Harmon was none of
17 these things.

18 That knife that was found on the scene is branded
19 Castlevew Hospital which, as far as I know, and I think as
20 pled in the complaint, is a hospital about 100 miles outside
21 of town here in Price. Mr. Harmon has no connection to this
22 town. It is clean. It is pristine. There is no evidence
23 of fingerprints.

24 THE COURT: Aren't you asking me to do now what I
25 said I was not prepared to do with Ms. Brabson, which is to

1 draw conclusions based on facts that you are submitting?

2 I'm confined to the record in your complaint, am I not, and
3 the facts that you have alleged and the information I see in
4 the video?

5 For example, I can't consider anything you just
6 said in deciding this motion, can I?

7 MR. LUTZ: Well, Your Honor, all of these facts
8 about the knife are facts that are pled in the complaint,
9 and what we are asking you to do is draw the inference in
10 support of another allegation that Mr. Harmon was unarmed,
11 and all of these facts together lend to the fact that it is
12 simply not the case that Mr. Harmon actually possessed this
13 knife.

14 THE COURT: I'm sorry. I apologize.

15 I was thinking that those facts on page 27 of your
16 complaint were from your brief. I think they are recited in
17 your brief. I forgot they were also in the complaint.

18 Go ahead.

19 Well, I still don't know if you have answered my
20 question. Maybe indirectly. Are you saying that the reason
21 that you allege Mr. Harmon was unarmed is because you have
22 considered and evaluated all of the available information,
23 including your own personal review of the video, the reports
24 after the fact and the fact that there was no additional
25 weapon found on Mr. Harmon, that it is not clearly shown in

1 the video, so there is a good faith basis to allege that he
2 was unarmed at the time of the incident?

3 Is that what you're saying?

4 MR. LUTZ: It is, Your Honor.

5 THE COURT: Okay. What about fleeing, what do I
6 do with that allegation in view of what I see in the video?
7 There is at least one point in the video where it seems
8 pretty clear to me there is movement back towards the
9 officer, some movement.

10 MR. LUTZ: Certainly, Your Honor, and some
11 movement is also alleged in the complaint. What the
12 plaintiffs have alleged is supported by the video, that Mr.
13 Harmon decided to flee from these officers because he was
14 scared of being arrested. He took off and he ran. Does he
15 maintain a perfectly straight direction in the opposite
16 direction of the officers through his entire travel away
17 from them? That is not entirely clear.

18 It is clear that there is some movement of his
19 body. We contend that what was happening there and the
20 reasonable examination for that is that he was looking
21 backward towards Officer Smith who was coming up on his left
22 side, the closest officer to him at that point in the chase.
23 His body motion continues away and the video will support
24 this. The allegation is well pled and the video will
25 support that his body motion is away from the officers

1 throughout the duration, and we have acknowledged in the
2 complaint that there may be some bodily motion in a
3 rotational direction, but he was fleeing the entire time as
4 pled in the complaint and as supported by the video of the
5 events.

6 THE COURT: Let's walk through the Graham factors
7 for a moment. Let's assume the --

8 MR. LUTZ: Certainly.

9 THE COURT: -- truth of the allegations in the
10 complaint. I don't recall that either party briefed this
11 question in the papers. The first Graham factor, the
12 severity of the crime at issue, you'll tell me that the
13 crime at issue is a traffic infraction.

14 MR. LUTZ: I will, Your Honor.

15 THE COURT: Let me give you a hypothetical. I'm
16 going to guess that you're going to tell me it may be
17 relevant to the second factor but not the first. The
18 officers have stopped somebody for the very same reason they
19 have stopped Mr. Harmon and they are conducting a records
20 check and they discover that this person that they have
21 stopped, or they believe that this person that they have
22 stopped is wanted for aggravated bank robbery, attempted
23 murder, a convicted felon with a record, known gang
24 affiliations and is believed to be armed and dangerous and
25 with an outstanding warrant that they are now going to

1 execute.

2 Is that relevant to the first factor or the second
3 or not at all?

4 MR. LUTZ: I would contend that it is relevant to
5 the second factor. I would not say that it is irrelevant
6 entirely.

7 What I am really keying in on with what the Court
8 has just said is the point that you raised about finding
9 information that this suspect in particular in the
10 hypothetical is armed and dangerous. Certainly officers can
11 consider that in the second Graham factor analysis in
12 assessing to what degree they need to be in fear of violence
13 from the suspect.

14 THE COURT: So the severity of the crime at issue
15 means the reason that law enforcement come into contact with
16 the suspect?

17 MR. LUTZ: That is how I would interpret it and I
18 think in this case it is particularly appropriate to read it
19 that way because of how minor the infraction was. That,
20 coupled with the second factor, and you have the most minor
21 traffic infraction, right? It is alleged in the defendant's
22 motion that the reason Chris Smith stopped Mr. Harmon was to
23 discuss bicycle safety. Right? It is not even, you know, a
24 municipal fraction or whatever it was. They needed to have
25 a conversation about bicycle safety. Then they had that

1 conversation for more than 20 minutes while Mr. Harmon was
2 being calm, cooperative, contrite and scared.

3 THE COURT: Is it really going to matter, because
4 I am required I think to consider the totality of the
5 circumstances, so however we categorize some of this
6 information it is all part and parcel with the information
7 available to the officer on the scene through an objective
8 lens.

9 Is that right?

10 MR. LUTZ: I agree with that, Your Honor. It is
11 the totality of the circumstances and we are forced with no
12 other choice but to wade through the factual morass.

13 THE COURT: What do I do with information that is
14 clear on the video to an observer relevant to the Graham
15 factors but not pled in the complaint? What is the legal
16 framework do you think for analyzing that?

17 For example, immediate threat to the safety of the
18 officers. Suppose, and you may disagree with this, but
19 suppose in watching the video someone were left with the
20 firm conviction that Mr. Harmon had already assaulted one of
21 the officers by running by and had knocked one of the
22 officers or impacted one of the officers so firmly that it
23 knocked the officer off his feet. That is not in the
24 complaint. That fact may be relevant to determining whether
25 the suspect posed an immediate threat to the officers.

1 Can I evaluate it or am I not permitted to?

2 MR. LUTZ: I appreciate the question, Your Honor.

3 At this stage in the litigation the standard that we're
4 evaluating does not inform the Court what to do as to what
5 is un-alleged, so nothing can contradict what is un-alleged.
6 So I don't think that the Court has an avenue to bring it.

7 Now, later down the line, you know, if that is in
8 fact true and these officers had an independent reason that
9 we are not aware of at this stage in the litigation they can
10 certainly present that at the summary judgment state.

11 THE COURT: You're starting to do what Ms. Brabson
12 was doing, and I know that it is just human nature, but
13 you're taking good pauses and then you are rolling really
14 fast.

15 What about Ronquillo? Even if it was implied
16 instead of express, in Ronquillo the plaintiffs didn't
17 include those facts in the complaint because they are not
18 helpful to the plaintiffs' theory of the case and the Court
19 relied on facts observed from the videos.

20 MR. LUTZ: Certainly, Your Honor. I am very
21 familiar with the Ryan Ronquillo case, it being litigated in
22 the District of Colorado where we hail from. This case is
23 simply not that.

24 THE COURT: I'm just asking about the treatment of
25 the un-alleged facts. How did that court deal with that?

1 MR. LUTZ: So I believe in Judge Arguello's
2 analysis there, she did not eliminate any of the plaintiff's
3 well pled allegations from contention based on anything but
4 what was affirmatively on the video. I don't think that
5 what she did was to go as far as to take and basically
6 create new allegations from the video.

7 THE COURT: You don't think her findings were
8 dependent on facts that she concluded were evident from the
9 video but not pled?

10 MR. LUTZ: From her analysis it appears to me that
11 her decisions on the facts were based on taking the
12 allegations and evaluating the video evidence to see whether
13 or not they were contradicted.

14 THE COURT: I see. Okay.

15 Is there more you wanted to say about the Fourth
16 Amendment claim before we turn to the Fourteenth Amendment?

17 MR. LUTZ: Certainly.

18 THE COURT: We have not talked about the knife, or
19 did we?

20 MR. LUTZ: We did submit on that, but I'm happy to
21 comment on that again if the Court would like.

22 There are a few comments that came up during the
23 defense colloquy that I would like to comment on if I have
24 the Court's permission to do so.

25 THE COURT: Please.

1 MR. LUTZ: One of the most important things that I
2 think that was said today and that the Court acknowledged is
3 that there is no point in the video where Mr. Harmon is
4 shown with the knife.

5 THE COURT: At least not clearly.

6 MR. LUTZ: At least not clearly. At least not in
7 the way that the video will allow that allegation in the
8 complaint that Mr. Harmon was unarmed to be disregarded, and
9 that tells us everything that we need to know about where we
10 start the legal analysis, and that is that we have an
11 unarmed fleeing suspect, because those allegations must be
12 taken as true and that places us in the world of Tennessee
13 v. Garner.

14 THE COURT: Why is Ms. Brabson incorrect? She
15 says, Judge, I mean, there is a legal standard and then
16 there is absurdity. Watch the video. Look where the knife
17 is. Look at everything before that. Could you really doubt
18 that Mr. Harmon brandished that knife?

19 MR. LUTZ: Absolutely, Your Honor. That is why we
20 are here. It is not absurd. It is supported by the video
21 and the standards are what they are and we are bound by
22 them, and the fact that the video does not even get close to
23 the level of blatantly contradicting the well pled
24 allegations in the complaint, they must be taken as true,
25 and their motion of the reasonableness of the Fourth

1 Amendment violation must be denied.

2 THE COURT: We see a knife inches away from Mr.
3 Harmon's right hand. I think he is right-handed. How do I
4 know that? I think you all agree with that. It is right
5 there on the ground. The most likely explanation at a
6 minimum is that he was carrying the knife when he was shot.
7 Do I just ignore that? How do I deal with that when I am
8 applying the Rule 12 standard?

9 MR. LUTZ: Well, Your Honor, you apply it the way
10 you would with any other allegation. There is a knife on
11 the ground. There are no allegations in the complaint about
12 how it got there and there is nothing in the video to
13 indicate how it got there. We don't see it coming from Mr.
14 Harmon's hand. The officers themselves don't appear to have
15 perceived it and no one mentions a knife. Officer Fox does
16 not say, Chris, knife. Watch out, Mr. Harmon has a knife.
17 He is down. Be careful while you are approaching him as he
18 is still alive because he has a knife in arm's reach. There
19 is no mention of it whatsoever.

20 In fact, when they found it, and I say found
21 because it was the first time they appeared to have
22 perceived it, well after the shooting, they thought it was
23 Officer Robinson's knife because of the style. There are
24 simply no answers from the evidence that we have here. When
25 we proceed to discovery in this matter we'll get some, and

1 if it is as clear as the defendants would like to make it
2 out, perhaps there are fingerprints on it, only discovery is
3 going to tell us that.

4 THE COURT: Is the problem the one that I
5 identified with Ms. Brabson or is it a different problem?
6 It seems to me that the defense is inviting me to draw an
7 inference in favor of the defendant as the moving party. Is
8 that the issue or is it a different one?

9 MR. LUTZ: That is precisely the issue, is that
10 the defendants' motion -- the argument is not made on the
11 facts alleged taken in conjunction with the video. It is
12 made on their own factual assertions about what the video
13 shows. At this stage, because we have this blatant
14 contradiction of the standard, we are just not going to get
15 to the point where their motion can prevail. If it is
16 unclear and if it is ambiguous or, as they mentioned, you
17 know, distorted or shaky, that tie at this stage goes to the
18 plaintiff.

19 THE COURT: What more about excessive force, if
20 anything?

21 MR. LUTZ: I think I will rest on that, Your
22 Honor.

23 THE COURT: Why don't we begin our Fourteenth
24 Amendment question with you, though, so that I can try to
25 better understand your position.

1 MR. LUTZ: Certainly.

2 THE COURT: Can you help me understand your
3 theories with respect both to the officer and -- it sounds
4 to me like you're alleging -- well, it is a little confusing
5 to me. I think you're alleging a training claim against the
6 department and an overt discrimination claim against the
7 officer.

8 MR. LUTZ: That is correct, Your Honor.

9 There are two pieces to this. There is the
10 municipal liability, the Monell failure to train, custom and
11 policy and practice, but --

12 THE COURT: One moment. I'm sorry.

13 MR. LUTZ: May I have one moment to confer with my
14 co-counsel?

15 THE COURT: With apologies, I can see that we have
16 a verdict from our jury. We'll actually continue our
17 argument while we're getting the lawyers here, but if you
18 will give us a moment to contact them. Why don't we keep
19 going until I see the lawyers get here and then we'll recess
20 for a few minutes and take the verdict.

21 Go ahead.

22 MR. LUTZ: To unpack the Fourteenth Amendment
23 analysis, so there is the Monell claim and then there is the
24 equal protection claim. The Monell claim would be against
25 the City of Salt Lake for their custom, policy and practice

1 and failure to train leading to a custom, policy and
2 practice of excessive force and racially biased policing.

3 The equal protection claim is about the custom,
4 policy and practice of racially biased policing. There is
5 the claim against the individual defendant, Fox, and there
6 is the claim against the city for allowing that to prevail.

7 THE COURT: One more time. The Monell claim,
8 custom and practice and training concerning racially biased
9 policing --

10 MR. LUTZ: That is correct.

11 THE COURT: -- and then as applied to Officer
12 Fox --

13 MR. LUTZ: It is an individual claim against
14 Officer Fox as well.

15 THE COURT: Racial discrimination?

16 MR. LUTZ: Correct.

17 THE COURT: What well pled factual allegations are
18 in the complaint that -- well, let me step back.

19 The defendants say, and I think this is right,
20 that if there is not a constitutional violation for the
21 officer, then there is not a Monell claim that follows.

22 Is that right?

23 MR. LUTZ: That is correct, Your Honor. We need
24 to have an individual violation of a civil right to make an
25 action out against the city for having created that

1 violation through its policy, custom or practice.

2 THE COURT: And there needs to be a correlation
3 between the two, right? What is your view about that? If
4 the excessive force claim goes forward but the Fourteenth
5 Amendment claim as to Fox fails, then what do you see as the
6 viability of the Monell claim?

7 MR. LUTZ: Well, the Monell claim as to the
8 general excessive policy and practice claim against the
9 city -- there is the excessive force component, right, and
10 an equal protection component. If we have a valid Fourth
11 Amendment violation against Officer Fox, then the excessive
12 force custom, policy and practice against the city can
13 survive.

14 It is exactly the same on the other side. If we
15 can demonstrate that Officer Fox violated Mr. Harmon's
16 rights to equal protection under the law, similarly the
17 Monell claim for the racially biased policing practice
18 against the city can go forward as a threshold, not in its
19 entirety, but as a threshold matter.

20 THE COURT: So with respect to the equal
21 protection claim and Officer Fox, what well pled factual
22 allegations are in the complaint that support that claim?

23 MR. LUTZ: As for Officer Fox -- so I would point
24 the Court toward the pertinent allegations which are at
25 pages 6 and 7 and paragraphs 125 through 133. I think the

1 most important thing here is that we acknowledge the full
2 context --

3 THE COURT: Say that again. Where?

4 MR. LUTZ: Pages 6 through 7, paragraphs 125
5 through 133. I apologize, Your Honor. I think those page
6 numbers may not be correct.

7 THE COURT: I have got it. Page 29, paragraph
8 125.

9 MR. LUTZ: That is correct. I apologize.

10 THE COURT: I am asking about Officer Fox.

11 MR. LUTZ: I understand that these allegations are
12 a little bit more general, but the reason that they are
13 appropriate to consider right now is because what we are
14 alleging, and I think what has been demonstrated by the
15 facts as pled in the complaint, is that we have a police
16 department that engages in a highly systemic, racially
17 biased pattern of policing. The way that we know that is we
18 know that through anecdotal evidence about the use of force
19 and we know that through the city's own statistical evidence
20 of the use of force against minorities.

21 So in 2018 four of the seven police shootings that
22 occurred in Salt Lake City involved victims of color. In
23 2018 all fatal police shootings in the City of Salt Lake
24 involved victims of color. In the City of Salt Lake as pled
25 in the complaint, a black person is five times more likely

1 to be subjected to the use of force than their white
2 counterpart.

3 Now, are these individual statements about Officer
4 Fox's state of mind? No. But why they are important is
5 because you cannot have a culture and a system that allow
6 this kind of pattern without individual officers
7 participating in it.

8 Going back to the incident in question, we have a
9 black man being pulled over to have a conversation about
10 bicycle safety by three white officers that ends up with
11 that black man dead, in a city where the statistics tell us
12 that this police department will use force against black
13 persons five times more likely than white persons, and where
14 every fatal police shooting in the year 2018 was a person of
15 color. It does not strain the mind to think that Officer
16 Fox might have had a racial motivation in his decision to
17 shoot and kill Mr. Harmon. We also know critically that
18 Officer Fox drew his firearm the very moment that Mr. Harmon
19 fled. That is consistent with the video and it is pled in
20 the complaint.

21 Now, at that point even Officer Fox's statements
22 don't support that he saw a knife so it raises the question
23 why? I don't think it is any stretch of the imagination to
24 say that Mr. Harmon's race was a substantially motivating
25 factor in the situation.

1 THE COURT: Have you not pulled us a country mile
2 from the Rule 12 standard I'm required to apply? I am
3 required to confine myself to your factual allegations that
4 are supported by a reasonable Rule 11 basis, right? Isn't
5 there one in the complaint? Isn't the answer to my question
6 paragraph 176? That is the only allegation in the complaint
7 concerning Officer Fox and race.

8 MR. LUTZ: That is the only allegation in the
9 complaint that alleges Officer Fox's state of mind with
10 regard to Mr. Harmon's race, but all of the other well pled
11 allegations about the system can be used to generate other
12 inferences about what Officer Fox was thinking. At this
13 stage in the litigation that is entirely what is
14 appropriate.

15 THE COURT: I mean I agree with you that I'm
16 required to evaluate the complaint in its entirety, and when
17 considering the reasonable inferences to draw, I consider
18 all of the allegations in the complaint. Even in paragraph
19 176, Mr. Harmon's race was a substantial motivating factor
20 in Defendant Fox's decision to use excessive force against
21 him. That is either conclusory -- let me ask this a
22 different way. Isn't that entirely conclusory?

23 MR. LUTZ: Taken in a vacuum it could read as
24 conclusory, but at this stage in the litigation what is
25 appropriate is to read it in conjunction with the other

1 allegations in the complaint that led to the conclusion.

2 THE COURT: I'm going to just assume that there is
3 a Rule 11 basis for making that allegation in the complaint.
4 You have alleged that a Salt Lake City officer was racially
5 motivated in shooting and killing a black man in Salt Lake
6 City.

7 MR. LUTZ: Yes.

8 THE COURT: That is an extraordinary allegation.
9 I assume that you have no evidence of any kind and you're
10 aware of no information that would suggest that Officer Fox
11 was substantially motivated by the defendant's race when he
12 chose to exercise excessive force in this instance. There
13 are no past incidents involving Officer Fox that you're
14 aware of. There are no statements made by Officer Fox.
15 There is nothing like that, right, that you're aware of?

16 MR. LUTZ: Well, Your Honor, this is precisely
17 why -- these are difficult claims to plead because what
18 we're asked to do is to get inside of the mind of the
19 defendant, and at this point the information that we have is
20 purely what happened and the context in which it happened.

21 THE COURT: So we just infer that this officer
22 shot and killed someone because of his color?

23 MR. LUTZ: It is not merely an inference --

24 THE COURT: Isn't it?

25 MR. LUTZ: -- in this context. I mean that is a

1 fair inference, but obviously what is pled in the complaint
2 does not prove Officer Fox's motivation in doing this, but
3 through discovery we can absolutely do that, and things such
4 as Officer Fox's personnel file and whether or not he has
5 been involved in other use of force incidents, his
6 deposition, all of these things will assist us in proving up
7 that claim.

8 THE COURT: Am I permitted, in considering a claim
9 like this, to go backwards, that is to say do I look at
10 evidence that there might be a problem in a department and
11 then infer that the officer acted consistent with evidence
12 about a departmental problem? Am I not required to go the
13 other way around?

14 MR. LUTZ: So for the Monell standard, it is
15 exactly that backwards looking analysis that you just
16 mentioned, that the policy of the department caused the
17 violation. So in alleging the Monell claim, we are
18 necessarily also alleging that the City of Salt Lake caused
19 the racially motivated use of force. That is precisely what
20 you can do, what the Court can do. I'm sorry.

21 THE COURT: I know that I'm not supposed to reach
22 beyond the allegations in the complaint, but I don't know
23 what to do with this. I just know, because I'm a citizen of
24 Salt Lake County, that one of the allegations you rely on
25 for your evidence of racial animus in the department

1 involved the shooting of a white suspect.

2 MR. LUTZ: Yes.

3 THE COURT: What do I do with that?

4 MR. LUTZ: That is fair, Your Honor. That
5 allegation was intended -- sorry if I included it in that
6 pin cite that I provided. That allegation was intended to
7 be read as part of the allegations of the general policy of
8 excessive force.

9 THE COURT: Paragraph 130 in the complaint does
10 not mean to relate to paragraphs under the heading Salt Lake
11 City's pattern of racially biased policing and the
12 discussion about shooting people of color and the preceding
13 paragraphs were intended to be unrelated to 130?

14 MR. LUTZ: I wouldn't say that they are unrelated,
15 because part and parcel of the racially biased policing is
16 deploying excessive force disproportionately. So it is
17 excessive force -- it is departmentalized excessive force in
18 general and disproportionately against minorities. These
19 things are completely related, and I think when we get to
20 evidence of what the training is, there will be substantial
21 relationships there.

22 THE COURT: Okay. What else, if anything,
23 relating to the equal protection claim?

24 MR. LUTZ: That is all from the plaintiff at this
25 time.

1 THE COURT: Thank you.

2 MR. LUTZ: Thank you, Your Honor.

3 THE COURT: Ms. Brabson, I think this is probably
4 a good time for us to take a recess.

5 You can leave your materials here, but maybe just
6 put them on the back tables if you would, please. You're
7 welcome to go stretch your legs or take a break if you would
8 like. This will take at least 15 or 20 minutes, so we won't
9 begin until sometime after 3:00.

10 Thank you, counsel.

11 MR. LUTZ: Thank you, Your Honor.

12 (WHEREUPON, another matter was heard.)

13 THE COURT: Ms. Brabson, I know we just concluded
14 a lengthy equal protection discussion, but I wonder if you
15 and I ought to circle back to excessive force for any
16 additional comments that you have in view of my discussion
17 with Mr. Lutz.

18 MS. BRABSON: Yes, I do have just a few points to
19 make on that, Your Honor.

20 The first point I would make is that Mr. Lutz
21 talked about the officer's movement being perhaps sideways
22 or towards one officer or another or maybe it wasn't
23 completely clear, and I would just note that the standard is
24 could a reasonable officer in the position of Officer Fox
25 have concluded that that movement was toward him and I think

1 the answer is yes based on the video.

2 THE COURT: But doesn't that require me to
3 disregard the allegations in the complaint? I mean this is
4 the starting point, isn't it? If the allegation is that the
5 defendant was fleeing, and I cannot conclude that the
6 video --

7 MS. BRABSON: Yes. It is both, Your Honor. Both
8 parts of the analysis apply here. The first part is is it
9 wholly inconsistent? The second part is could a reasonable
10 officer in the position of Officer Fox have concluded that
11 that movement was toward him?

12 Let me explain just a little bit about this. This
13 is not a case where, at the end of the video, next to Mr.
14 Harmon's hand was a cell phone and we are arguing about
15 whether the officer made a reasonable interpretation but a
16 mistaken one. That is not where we are here. We're at a
17 place where at the end of the circumstances there is a knife
18 in the video which actually is consistent with what Officer
19 Fox said occurred.

20 I have had the opportunity since we had the break
21 to pull out my copy of the Ronquillo case and I just want to
22 read a portion of it for the Court. Now, this is the
23 court's analysis and the portion of the video that shows the
24 car moving and how that can be interpreted with respect to
25 the events that occurred outside of the frame of the video.

1 THE COURT: Not too quickly, please, when you
2 read.

3 MS. BRABSON: Yes. I will try to read this
4 extremely slowly for the benefit of the reporter. The
5 court's review of the video surveillance, however,
6 contradicts the plaintiffs' allegation that Mr. Ronquillo
7 was shot as soon as he put or was putting his car in gear to
8 move forward. The video instead shows Mr. Ronquillo's car
9 rapidly accelerating forward over a median into the parking
10 lot and crashing into the SUV wedge, and this is the key
11 part of the opinion, the car movement is wholly inconsistent
12 with the notion that Mr. Ronquillo was shot before ever
13 pressing on the gas. The Court cannot, therefore, take that
14 allegation as true.

15 So I think Your Honor's concern was whether I was
16 asking you to draw an inference and it might be a matter of
17 semantics, but I do think it is permissible for the Court to
18 conclude whether or not the video is wholly inconsistent
19 with the allegation. As applied here, the video that shows
20 the knife inches from Mr. Harmon's hand is wholly
21 inconsistent with the allegation that he was unarmed. I
22 think that that is an appropriate conclusion for the Court
23 to draw. I remind the Court that Ronquillo was affirmed
24 before the Tenth Circuit.

25 Lastly, Your Honor, I would just point out that

1 there have been no allegations -- I'm sure if they could
2 have met Rule 11, there would have been -- that one of the
3 officers planted the knife, and there have been no
4 allegations even that the knife was randomly there, and for
5 you to conclude -- make either of those conclusions would
6 require the Court to speculate as to either of those things.
7 There have been no allegations on either of those topics.

8 Unless you have any questions about equal
9 protection, I don't have anything else to present at this
10 time.

11 THE COURT: I do have a question about equal
12 protection.

13 MS. BRABSON: All right.

14 THE COURT: I will circle back to Mr. Lutz, too.
15 I think I was becoming a little distracted as our jury was
16 coming back. I just want to make sure, and I think we're
17 all speaking the same language, but when we talk about the
18 municipal liability flowing from or being dependent upon the
19 individual officer's liability, we consider that discretely
20 with respect to excessive force and separately with respect
21 to equal protection, I think.

22 For example --

23 MS. BRABSON: Correct.

24 THE COURT: -- if the excessive force claim
25 proceeds as to Officer Fox, and I'm not saying it does, but

1 if it does, but I find that there is not an adequate basis
2 to proceed with the equal protection claim as to Officer
3 Fox, then the municipal liability equal protection claim
4 necessary fails.

5 Is that true? Did I say that correctly? That is
6 the excessive force claim against the city relating to
7 training, supervision, practice and policy is dependent on
8 the excessive force claim going forward with respect to
9 Officer Fox.

10 MS. BRABSON: Yes.

11 THE COURT: And vice versa with equal protection.

12 MS. BRABSON: Correct.

13 THE COURT: The plaintiffs cannot go forward on an
14 equal protection claim against the municipality, only on an
15 excessive force claim as to Officer Fox.

16 MS. BRABSON: That is correct. I would agree with
17 that analysis. There may be other reasons that the
18 municipal liability claim would fail, but those are not
19 before the Court in this motion.

20 THE COURT: Give me one moment, will you, please.

21 MS. BRABSON: Sure.

22 THE COURT: Mr. Lutz says that the equal
23 protection claim against Officer Fox is adequately pled
24 because I have to read all of the allegations in concert and
25 in connection with one another and in the totality of the

1 four corners of the pleading, not just in isolation with
2 paragraph 176.

3 And you say what?

4 MS. BRABSON: I say if you read the Blackwell vs.
5 Strain case, that would suggest otherwise. Blackwell vs.
6 Strain involved some statistics that involved some traffic
7 stops at a point of entry. Those statistics were found to
8 be not enough to plead a claim against that officer, in part
9 because they didn't have an adequate basis of comparison.
10 We don't even have that much alleged here. Those statistics
11 were directed specifically against the officer who was named
12 as a defendant. We don't have a single fact, direct or
13 circumstantial, that would allow a plausible inference to be
14 drawn that Officer Fox was motivated by racial animus.

15 THE COURT: I think Mr. Lutz disagreed with me
16 when I asked whether he had inverted the analysis. If we
17 just focus exclusively on equal protection for a moment, I
18 can't look to allegations about departmental racial animus
19 or bias or equal protection problems and infer those
20 problems to supplement allegations concerning the individual
21 officer.

22 Is that true or not true?

23 MS. BRABSON: That is true. I would cite the
24 court to Blackwell vs. Strain and Columbia that are cited in
25 our materials.

1 THE COURT: Thank you, Ms. Brabson.

2 Mr. Lutz, any last words? Come on up if you have
3 any. I can tell that you and your colleague disagreed with
4 some of what was just said. This is the time for oral
5 argument and I'm here to hear anything you would like to
6 say.

7 MR. LUTZ: Thank you, Your Honor.

8 THE COURT: Better snow in Salt Lake or in Denver?

9 MR. LUTZ: Hard to say at this point. It is a
10 little whiter here. It is kind of dirty in Denver.

11 THE COURT: Good.

12 MR. LUTZ: Your Honor, thank you for the
13 opportunity to offer one additional comment. It is not
14 exactly a legal comment, and what it is in regard to the
15 equal protection claim I think there is something that is
16 very important that we talk about and it is the lens in
17 which we view the equal protection claim.

18 Racism is different today than it was when they
19 passed the Fourteenth Amendment. The equal protection claim
20 requires that we plead a lot of things that are going to be
21 very difficult to prove from the outset and begs for
22 evidence that is not likely to exist at the outset anymore.
23 The days are gone when racist behavior is going to be
24 predicated by unapologetic indications of it like slurs.
25 Racism is more sophisticated than it has been before.

1 Now, this does not exactly inform the legal
2 analysis, but I think it is important that we make this
3 point. When this video came out in the community, the
4 community reacted that this was an incident of racial
5 injustice and it should be the community that this goes back
6 to to decide whether or not that is in fact the case.

7 Thank you, Your Honor.

8 THE COURT: Let me say that I think I largely
9 concur with what you're saying about racism in our society
10 today and I think that there seems to be ample support for
11 that view. There may be large societal considerations
12 implicated by this case and others. It is not just lip
13 service when I say that I'm a pedestrian court. I am not a
14 policy making court. I am not a jury. I go searching for
15 the legal standard that I think applies and I do my very
16 best to apply that standard as I understand it to the facts
17 in front of me.

18 What you just said I don't understand to be a
19 basis to amend a Rule 12 analysis. I can't now off the top
20 of my head come up with an analogy, an analogous kind of a
21 claim, but just on a basic Rule 12 plausibility basis, a
22 sentence in a complaint that is -- I don't know how to view
23 it other than conclusory. It can't carry a claim across the
24 line of plausibility, whatever I think about it.

25 MR. LUTZ: I completely understand the legal,

1 technical aspect of that, but from our perspective and from
2 the community's reaction to these events and everything that
3 we have seen in bringing this case forward, it is just
4 absolutely unplausible to us that we could put this case
5 before a jury of 12 black people from the city of Salt Lake
6 who would return a verdict other than anything that this was
7 an equal protection violation. I appreciate that that is
8 not going to fit within the technical bounds of what the
9 Court is asking for, but I think it is important that we
10 note that.

11 THE COURT: Well, it also ignores the reality of
12 the video. I don't know how this is going to come out yet.
13 I have not prejudged the outcome of this motion, but it also
14 ignores the fact that a suspect who is told that the
15 officers are going to execute a warrant and take the
16 individual into arrest, who then flees, who then turns
17 around and runs back through the officers knocking one to
18 the ground, who is disregarding and disobeying commands, I
19 mean, this is different than some of the videos we have all
20 seen circulating about shootings that I think more clearly
21 implicate a question about what is motivating the officers.
22 I am not unsympathetic to what you're saying. I hear what
23 you're saying and I appreciate your argument today.

24 Thank you.

25 MR. LUTZ: Thank you, Your Honor. We appreciate

1 the Court's consideration.

2 THE COURT: Anything more, Ms. Brabson?

3 MS. BRABSON: No, Your Honor. Thank you.

4 MR. DEISS: Your Honor, I would like to be heard
5 for a moment.

6 THE COURT: Come on up, Mr. Deiss.

7 MR. DEISS: I don't need to. I can stay here.

8 I just would like to say that if the Court feels
9 like it is inclined and feels like there is more information
10 needed on the Fourteenth Amendment case, we believe we have
11 subsequent information that can tie in to show that Officer
12 Fox has at least a history at this point of further racial
13 acts. We would welcome the opportunity to amend if that is
14 the case.

15 THE COURT: Okay.

16 MR. DEISS: I will also say that we just learned
17 this.

18 THE COURT: We'll go a step at a time. I mean I
19 have a motion before me that is drawn to a pleading before
20 me, and I see a bunch of smart lawyers in this courtroom and
21 you know what is available in your toolbox. If there is a
22 motion you need to file in view of a ruling, then we'll find
23 the standard and we'll apply it. I appreciate what you're
24 saying, Mr. Deiss. I think it may turn on -- if the equal
25 protection claim fails, it may turn on what basis it fails.

1 I don't know. I just don't know how to do this except one
2 step at a time.

3 Let me say, counsel, that I appreciate your
4 consideration and your patience as we had the interruption
5 this afternoon. Thank you. I appreciate your argument.

6 We'll be in recess.

7 (Recess)